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**IN THE
Supreme Court of the United States**

October Term, 1983

No. 83-1429

ALABAMA POWER CO., et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**MOTION OF OHIO MINING AND RECLAMATION
ASSOCIATION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI
AND
BRIEF AMICUS CURIAE IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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FOR WRIT OF CERTIORARI
AND
STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Ohio Mining and Reclamation Association (OMRA) respectfully moves the Court for permission to file the attached brief *amicus curiae* in support of the Petition for a Writ of Certiorari. The Interest of OMRA in this case is set forth below.

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

OMRA is a trade association whose members are Ohio coal producers. Ohio is a major coal producing state, with 21.5 billion tons of bituminous high sulfur coal reserves concentrated in 23 eastern counties. Nearly all of Ohio's coal is produced by OMRA member companies.

Approximately 85% of Ohio coal is sold to electric utility companies to be used in the generation of electricity. The coal industry in Ohio and other Appalachian states has been severely impacted by, and is very sensitive to, implementation of the Clean Air Act. Total Ohio coal production has dropped precipitously from a peak

of 55,136,699 tons in 1970, to 33,209,000 tons in 1983.¹ At 1983 prices, this decline represents a direct loss of over \$613 million to Ohio coal mining communities, not counting "ripple effect" losses. A study by the United States Environmental Protection Agency (EPA) found that Ohio lost 6.76 million tons (\$190 million) of annual coal production solely as a result of electric utility "coal switching" (from Ohio coal to relatively lower sulfur coal produced in other states) to comply with sulfur dioxide (SO₂) limitations imposed under the Clean Air Act in 1976 and 1977.²

The cost of this decline in production measured in terms of jobs lost has been tremendous. The EPA study, which focused only on the effects of the loss of 4.05 million tons of annual coal production attributable to coal switch-

¹The following table, compiled from OMRA statistics, shows the extent to which total Ohio coal production has declined steadily since the Clean Air Act of 1970 was enacted and over time as it has been amended and implemented.

<u>Year</u>	<u>Production</u>
1970	55,136,699
1971	49,016,773
1972	50,577,531
1973	45,666,478
1974	45,074,596
1975	46,167,203
1976	46,803,891
1977	46,940,131
1978	40,094,185*
1979	43,527,651
1980	40,030,424
1981	36,833,359*
1982	36,906,301
1983	33,209,000

*Portion of decline due to United Mine Workers strike.

²See, Reproposed Determination Under Subsection 125(a) of the Clean Air Act; Availability of Coal Use, Economic and Unemployment Impact Information, 46 Fed. Reg. 8106 (January 26, 1981).

ing by Ohio utilities, found that the lost production would result in the loss of 1,890 coal mining jobs. In addition, EPA found that the direct loss of coal mining jobs would have a "ripple effect" resulting in an even greater loss of jobs in other related sectors of employment. According to the study, the "unemployment attributable to the actual and projected Ohio power plant SO₂ compliance coal switch estimated by EPA would amount to between 4,725 - 5,480 jobs statewide."³ Even more significantly, the EPA study found that 4,252 - 4,915 jobs would be lost in the 23 county southeastern Ohio coal producing area — an economically deprived Appalachian area that struggles with chronic hard core unemployment in an economy entirely dependent on coal mining. A similar state of affairs is certain to exist in Appalachian coal communities outside Ohio.

It is against this background that OMRA has cause to be especially concerned about the grave impact of the lower court's decision on both existing coal supply contracts and the prospects for future markets for Ohio coal.

The demand for Ohio coal is acutely sensitive to changes in SO₂ emission limits. SO₂ emission limits established for Ohio utilities in 1976 and 1977 were determined through modeling that was based on the then-prevailing EPA "good engineering practice" ("GEP") standard of 2.5 times building height. A reduction in credit given for stack height will reduce emission limits. As the lower court acknowledged, the "burden" created by changing the rules as to stack height may lead utilities to "renegotiation of contracts in order to purchase coal with lower sulfur content." *Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C. Cir. 1983).⁴ In view of the fact that it is not eco-

³*Id.* at 8109.

⁴Coal supply contracts now regularly include provisions which permit the utility purchaser to terminate the contract if it is unable to burn the coal produced in compliance with applicable SO₂ regulations. See generally, 4 Coal Law and Reg. § 84.04[7] (1983).

nomically or technologically feasible to reliably blend coals with different sulfur contents to achieve an acceptable average, even marginal reductions in emission limits threaten termination of entire coal supply agreements. Consequently, reductions in emission limits compelled by the lower court's rejection of the 2.5 rule are likely to come directly at the expense of further losses to the Ohio coal industry.⁵ Similarly, the lower court's rejection of EPA's "plume impaction" rule and its restrictive definition of "nearby" as it relates to terrain obstacles can only lead to further reductions in emission limits, and thereby the demand for Ohio coal, by sources located in or near rugged Appalachian terrain.

Ohio utilities alone have already spent \$1.8 billion for air pollution controls, more than utilities in any other state and half a billion dollars more than utilities in the second-ranking state.⁶ Compliance strategies, and related coal supply contracts, have been developed

⁵Illustrative of the devastating effect of coal switching and the resulting mine closings is the impending closing of the Sunnyhill Mine in New Lexington, Ohio. The Michigan Air Pollution Control Commission has ordered Consumers Power Company of Jackson, Michigan to begin burning low sulfur coal in order to comply with SO₂ emission limits established under the Michigan plan to implement section 110 of the Act. Unless an extension of the time within which Consumers Power must bring its SO₂ emissions into compliance is obtained, the Sunnyhill Mine, which supplies 1.5 million tons of coal annually to Consumers Power (ninety percent of its total production), will be closed. The result will be the immediate loss of 500 coal mining jobs, the loss of hundreds of other jobs through the "ripple effect," a dramatic drop in local government revenues, and serious disruption of the local school system. See, Columbus Dispatch, December 25, 1983.

⁶Department of Energy, Energy Information Administration, Publication No. DOE/EIA-0437(1982), Financial Statistics of Selected Electric Utilities for 1982 (1984).

and entered into on the basis of emission limits established in reliance on the traditional 2.5 times building height GEP stack height formula. The lower court's rejection of EPA's stack height regulations threatens a catastrophic unraveling of an existing interdependent system of pollution control strategies and coal supply agreements.

Not only does the decision of the court below threaten existing sales of Ohio coal, but it also threatens to forever foreclose new markets. As discussed above, the threat to existing coal production comes from the fact that existing power plants will likely comply with reduced emission limits by switching to lower sulfur coal. The threat to new markets for Ohio coal comes from the fact that the lower court's decision will result in artificially induced emission limits so low that Ohio coal cannot be burned even with the best available control technology. As then EPA Administrator Douglas Costle explained, new source SO₂ emission limits for power plants were intentionally set by EPA at the lowest level that was obtainable by burning high sulfur coal with the use of control technology capable of achieving a 90% reduction in emissions:

Regarding the maximum emission limit, EPA had to determine a level that was appropriate when a 90% reduction in potential emissions was applied to high-sulfur coals. Towards this end, the staff performed detailed assessments of the potential impacts of a wide range of emission limitations on high-sulfur coal reserves. The results revealed that a significant portion (up to 22%) of the high-sulfur coal reserves in the East, Midwest, and portions of the Northern Appalachian coal regions would require more than a 90% reduction if the emission limitation was established below 1.2 lb/million Btu (30-day rolling average).

• • •

Accordingly, EPA concluded the emission limitation should be maintained at 1.2 lb/million Btu (30-day rolling average). A more stringent emission limit would be counter to one of the basic purposes of the 1977 Amendments, that is, encouraging the use of higher sulfur coals.⁷

When compared to the EPA regulations, the lower court's decision produces greater artificial exaggeration of ambient air quality impacts of proposed new sources,⁸ and greater artificial reductions in the margin of growth available before ambient air quality standards or prevention of significant deterioration increments are exceeded.⁹

⁷D. Costle, *New Source Performance Standards for Coal-Fired Power Plants*, 29 J. Air Poll. Contr. A. 690, 691 (1979).

⁸The decision of the court below dictates that, for the purpose of calculating Clean Air Act emission limits, source stacks be fictitiously shortened to a greater extent than prescribed by EPA's regulations and the traditional 2.5 times building height GEP formula. The more a stack is fictitiously shortened, the higher will be the imaginary concentration of the relevant "worst case" predicted ambient air quality impact of the source. The higher the predicted impact, the lower the allowable emission rate.

⁹For most areas of the country, there is a finite margin by which actual air quality is better than the National Ambient Air Quality Standards. The decision of the court below has the effect of fictitiously worsening air quality for purposes of EPA's standard-setting bookkeeping. The resulting fictitious smaller margin between predicted air quality and the National Ambient Air Quality Standards means less "room" to accommodate even a small amount of growth in emissions from new sources.

Similarly, the decision below skews EPA's bookkeeping of the consumption of the significant deterioration increments set forth in section 165 of the Act, 42 U.S.C. § 7465, and thereby locks out a portion of the new source growth that could have been accommodated under the regulations that were set aside.

Thus the decision below artificially decreases the room available to accommodate new sources, and, as explained in the preceding footnote at the same time artificially increases the room "occupied" by new sources.

As a result many new power plants will be subject to emission limits more stringent than the 1.2 lb/million Btu new source performance standard,¹⁰ thereby effectively prohibiting their use of higher-sulfur coal. Indeed, the artificially determined emission limits that result from the lower court's decision will be so low in some cases that new source construction will be foreclosed entirely.

Equally significant, but not addressed by the lower court, is the adverse impact on future markets for Ohio coal of the rejection of EPA's uniform and predictable GEP formula, which the lower court conceded Congress "probably had in mind," 719 F.2d at 457. Electric utilities and other potential consumers of Ohio coal require long-term fuel supply commitments (often ten years or more)¹¹ which require very large capital commitments by the coal producer. Hence, the lower court was seriously mistaken in its simplistic assumption that the only justification for a GEP formula is that it is "simpler and cheaper," 719 F.2d at 456, to apply. Much more important is the fact that only a fixed "formula" approach to determining GEP provides the stability and predictability necessary if Ohio coal producers and their potential customers are to undertake the long-range planning and huge capital commitments that are required to enter into long-term coal supply contracts.

The lower court's rejection of a GEP formula makes it impossible to determine the amount of stack height credit available at a given site, and thus the SO₂ emission limits for that site, in advance of a modeling demonstration. Moreover, the decision below renders GEP stack height, once established, subject to revision and variation

¹⁰Generally section 110 of the Act, 42 U.S.C. § 7410, prohibits ambient air quality standards from being exceeded and section 165, 42 U.S.C. § 7465, prohibits prevention of significant deterioration increments from being exceeded.

¹¹EPA regulations require that utilities provide proof of a ten year supply of "compliance" coal. *See, e.g.*, 40 C.F.R. § 52.1882 (a)(4) (iii)(A) and (B).

as modeling assumptions change.¹² The resulting uncertainty will discourage new sources from entering into long-term contracts for Ohio coal supplies and will, instead, pressure them to locate in or seek coal supplies from other areas.

¹²Computer models used by EPA to simulate the dispersion of pollutants in the ambient air require hourly meteorological data (wind speed, wind direction, and atmospheric stability), source emission characteristics (stack height, and the temperature, velocity, and mass of emissions), and topography as input. The model calculates hourly pollutant concentrations at each of hundreds of "receptors" carefully selected to locate the worst case impact from a single source and the worst case cumulative impact from all sources that interact. The identifiable impacts of all interacting sources are added to the background concentration to give the total predicted pollutant concentration at all receptors.

The input variables that determine the model output are subject to constant change. Meteorological conditions vary all the time, new emission sources are established and old ones retired over time, and pollutant background concentrations vary from one time to another and one place to another. Moreover, modeling methodology, formulas, and policies are themselves subject to frequent change by EPA, and on occasion by the courts.

By requiring that "excessive concentrations" for purposes of defining allowable stack height credit under section 123 be determined on a case by case basis, the lower court has rendered determinations under section 123 subject to all the vagaries of air quality computer modeling as exacerbated by the use of intentionally false input data. As a consequence, the court below made GEP into a moving target that will change with each different modeling analysis that is conducted.

The Clean Air Act exposes a source to frequent modeling analyses even though nothing has changed at the source since the last modeling analysis. A proposal to locate a major new source within interacting range of an existing source requires modeling of the proposed new source *and* interacting existing sources at their GEP stack height. *Alabama Power Co. v. Costle*, 636 F.2d 323, 388-94 (D.C.Cir. 1979). Also, whenever a State seeks to redesignate an area as attainment under Section 107 of the Clean Air Act, 42 U.S.C. § 7407, EPA usually requires a modeling analysis to justify the redesignation.

II. CONCLUSION

OMRA seeks the Court's permission to submit its brief *amicus curiae* in support of the Petition for a Writ of Certiorari in order to demonstrate that the conclusions reached by the lower court fly in the face of one of the central objectives of the Clean Air Act Amendments of 1977 — to improve air quality without creating a disruption in existing energy markets and without giving one region of the Nation an advantage over another with respect to industrial development. Indeed, as explained in the attached brief, Congress included provisions in the 1977 amendments for the specific purpose of encouraging the use of domestic coal supplies, particularly including the medium and high sulfur coals found in Ohio and other Eastern and Midwestern states, in a way that would not compromise the basic health and welfare goals of the Act. The decision of the court below wholly ignores, and raises serious obstacles to the accomplishment of, this plainly expressed Congressional objective. OMRA's member companies are among those who are the most adversely affected by the decision below.

Accordingly, this Motion for Leave to File Brief *Amicus Curiae* in support of the Petition for a Writ of Certiorari should be granted.

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The filing of the foregoing motion has been necessitated by the refusal to give consent of the Natural Resources Defense Council, the Sierra Club, and the States of New York and Pennsylvania.

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BRIEF AMICUS CURIAE OF THE
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IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI

I. INTEREST OF AMICUS CURIAE

The interests of the *amicus curiae* are set forth in the attached Motion for Leave to File Brief *Amicus Curiae*.¹

II. INTRODUCTION AND SUMMARY OF
ARGUMENT

In rejecting EPA's regulations, the court below interpreted section 123 of the Clean Air Act in a manner squarely in conflict with one of Congress' principal objectives — to encourage the use of the Nation's abundant coal resources without sacrificing sound environmental goals. As the discussion below demonstrates, Congress was keenly aware of the potential impact of the Act on the demand for coal, particularly the medium and higher sulfur coals

¹The motion and brief together do not exceed applicable page limits for briefs *amicus curiae*. See, Supreme Court Rule 36.1.

found in the East and Midwest. Congress was similarly aware that there was a potential for the Act to create a bias, not only in the demand for fuel supplies, particularly coal, but also for the creation of advantages for one region of the Nation over another with respect to future industrial growth. In response to these concerns, Congress inserted provisions in the Act expressly intended to neutralize the bias towards lower sulfur coal, and the location of new emission sources in regions where such coal is found, by eliminating incentives for new pollution sources to switch to the lower sulfur coals as a means of reducing SO₂ emissions. The decision below, by interpreting section 123 in a manner which it acknowledges may force utilities burning higher sulfur coal to switch to lower sulfur coal, *Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C.Cir. 1983), and by instructing EPA to promulgate new regulations which "err on the side of reducing stack height" in order to further reduce emissions, 719 F.2d at 450, has turned these important Congressional objectives on their head.

III. ARGUMENT

When Congress set about the enactment of the Clean Air Act Amendments of 1977, it had before it the benefit of experience gained during seven years of implementation of the Clean Air Act of 1970. Based on this experience Congress was particularly concerned that "new source performance standards" for power plants promulgated by EPA up to that time had not achieved several objectives sought in 1970 and had, in fact, "sometimes had very different, almost opposite, results."² The House Report identified six respects in which EPA's new source per-

²H.R. Rep. No. 294, 95th Cong., 1st Sess. 93, 187 (1977), reprinted in, The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Act Amendments of 1977*, 2560 (1978) (hereinafter referred to as "1977 Legis. Hist.").

formance standards had produced results in conflict with earlier established Congressional objectives, three of which are directly relevant here:

1. The standards give a competitive advantage to those States with cheaper low-sulfur coal and create a disadvantage for Midwestern and Eastern States where predominantly higher sulfur coals are available;
2. These standards do not provide for maximum practicable emission reduction using locally available fuels, and therefore do not maximize potential for long-term growth;
3. These standards do not help to expand the energy resources (this is, higher sulfur coal) that could be burned in compliance with emission limits as intended.³

The House Report reflects its conclusion that the problem with the new source performance standards stemmed from the fact that under existing regulations new coal-burning sources could comply with SO₂ emission limits (1.2 lbs per million Btu heat input) either by burning low sulfur coal or by installing costly "best available control technology."⁴ Most sources, particularly utilities, chose the less expensive alternative presented by low sulfur coal. The result was a significant bias in the national energy markets in favor of low sulfur coal as a fuel. The House Report explained the problem:

Present new source performance standard regulations do not require use of any pollution control technology when a source burns very low-sulfur coal. While this promotes the use of low-sulfur coal and drives up the price of the coal, it means that billions of tons of medium- and high-sulfur coal (lo-

³*Id.*, at 187.

⁴*Id.*, at 186.

cated predominantly in the Midwestern and Eastern United States) remain in the ground, unmined. Of course, many new plants are taking advantage of this weakness in present regulations by either hauling low-sulfur coal great distances to use in new plants or by actually relocating their plants near new low-sulfur coal reserves. In this way, they escape requirements for pollution control technology while vast reserves of high- and medium-sulfur coal — particularly in the East and Midwest — are going unused. The mining industry of those regions stagnates and industrial migration of other plants is threatened.⁶

To neutralize the bias which had been created in favor of low sulfur coal Congress elected to require that all new sources install the best available control technology and to require that all emissions be reduced by some percentage to be established by EPA regardless of the fuel burned. As a result, installation of best available control technology could no longer be avoided by burning low sulfur coal as a means of meeting new source performance standards.

In a statement to the House Subcommittee, then EPA Administrator Costle endorsed Congress' new source performance standard strategy as a method of simultaneously achieving the objectives of reducing emissions, increasing utilization of medium and high sulfur coals, and avoiding the drastic adverse economic consequences that would be visited on some regions as a result of a shift toward low sulfur coal.

We support the provision in the House bill requiring that new sources use best available control technology (BACT) considering cost, energy, environmental, and health impact.

First, we will more effectively limit the increased emissions resulting from greater coal utilization. Second, we will use less of our air quality resources for

⁶*Id.*, at 166.

each new facility, thereby allowing more growth within the constraints of air quality requirements. Third, the BACT requirement will encourage powerplants to use locally mined high and medium sulfur coal instead of bringing in low sulfur coal from other regions.

This will avoid much of the regional unemployment and economic disruption that would result from greater reliance on low sulfur coal rather than on control technology. Finally, the BACT requirement will minimize the overall atmospheric loading of pollutants in our environment.⁶

Significantly, Congressional action on the Clean Air Act Amendments of 1977 also coincided with and intentionally complemented President Carter's National Energy Plan, in which increased utilization of the country's huge coal reserves played a major role.

Coal development and production is most economical when it is near major markets. Although coal production will expand in many areas, there should be large production increases in the highly populated Eastern and Mid-West regions, where coal use in industry and utilities could grow considerably in the future. The required use of best available control technology for new power plants should stimulate even greater use of high sulfur Mid-Western and Eastern coals.⁷

Thus Congress sought and was able to serve still another objective — reduction of the Nation's dependence on imported oil — by encouraging the use of Eastern and Mid-western high sulfur coal without compromising its en-

⁶Clean Air Act Amendments of 1977: Hearings on H.R. 4151, H.R. 4758, and H.R. 4444 before Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 1678 (1977).

⁷Executive Office of The President, National Energy Plan 65 (1977).

vironmental mission. The House Report makes clear that a primary purpose of the Clean Air Act Amendments of 1977 was to increase the use of coal, including medium and high sulfur coal, to serve national energy goals.

The committee has designed this section and the entire bill, to encourage and facilitate the increased use of coal, and to reduce reliance (by old and new sources alike), upon petroleum to meet emission requirements (sic). * * * In fact, the committee anticipates that economic factors actually will dictate the use of coal. Thus, the committee proposal will provide strong, positive incentives for new sources to forego the use of oil as a means of complying with State plan requirements, in favor of more abundant, less expensive domestic coal. * * * As a result, millions of tons of coal, including currently unutilized medium and high sulfur reserves in the East and Midwest, will be burned by new sources which will use the best available technology to meet new source performance standards and State plan emission requirements."

In short, it is plainly apparent that one of the most important objectives of the Clean Air Act Amendments of 1977 was to correct a bias that had been created by implementation of the Clean Air Act of 1970 in favor of low sulfur coal, and to encourage the use of local coal reserves, particularly the medium and high sulfur coal found in the East and Midwest. It is difficult to imagine a construction of section 123 which would place it more at odds with the accomplishment of Congress' goal than that of the court below.

The Ohio coal industry today produces 14 million fewer tons of coal on an annual basis than it did in 1977. Indeed, the loss of coal production since 1977 has been even greater than the loss that occurred between 1970 and 1977 which Congress sought to reverse through the

^a*Legis. Hist.* at 192-193.

Clean Air Act Amendments of 1977. By limiting the focus of its review much too narrowly, and by substituting its judgment for that of EPA, the court below has dealt this already struggling industry a crushing blow squarely in conflict with plainly expressed Congressional intent.

IV. CONCLUSION

For this reason, and those set forth in the Petition of Alabama Power Co., *et. al.*, and the response of Kenne-cott, *amicus curiae* Ohio Mining and Reclamation Association respectfully urges the Court to grant *certiorari* and reverse the decision of the court of appeals.

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